

Thomas Jefferson to William Duane, May 23, 1801, The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO WILLIAM DUANE J. MSS.

May 23, 1801.

Dear Sir, —I have duly received your favor of the 10th & shall always be thankful for any information you will favor me with, interesting to our affairs, & particularly which may enable me to understand the differences of opinion and interest which seem to be springing up in Pensva. & to be subjects of uneasiness. If that state splits it will let us down into the abyss. I hope so much from the patriotism of all, that they will make all smaller interests give way to the greater importance of the general welfare.

I now write to Mr. Boudinot, forwarding the specimens of Mr. Reich's talents as an engraver and recommending to him to consider whether he may not be usefully employed for the public. Will you be so good as to mention this to Reich & to desire him to present himself to Mr. Boudinot two or three days after you shall have received this.

As to your proposition on the subject of stationery I believe you may be assured of the favor of every department here. You have no doubt contemplated placing your supplies here. My custom is inconsiderable & will only shew my desire to be useful to you.

From a paragraph in your letter to Mr. Gallatin I think you must have forgotten the particulars of what passed here on the subject of the prosecution against you. To recall it to your mind I will just recapitulate that I asked if you could give me an exact list of the prosecutions of a *public* nature against you, & over which I might have a controul; observing that whenever in the line of my functions I should be met by the Sedition law,

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I should treat it as a nullity. That therefore, even in the prosecution recommended by the Senate, if founded on that law I would order a *nolle prosequi*; but out of respect to that body should be obliged to refer to the attorney of the district to consider whether there was ground of prosecution in any court and under any law acknowledged of force. I thought you expressed some dislike to a change of judicature and

you could not furnish then a correct statement of the prosecutions, but would do it after your return to this city. This at least was the impression left on my mind, and I ascribed your not having furnished so specific a list of the prosecutions as would enable me to interpose with due accuracy either to the distance of the trials or perhaps a willingness to meet the investigation before a jury summoned by an impartial officer. The trial on behalf of the Senate being postponed, you have time to explain your wishes to me, and if it be done on a consultation with Mr. Dallas, it may abridge the operations which shall be thought proper.¹

¹ On this case of Duane, Jefferson wrote to R. R. Livingston as follows:

“ Washington, May 31, 1801.

“ Dear Sir,—Our attorney general being absent, and none of the other members of the administration being professional lawyers, I am obliged to decide for myself in a case of law, which, in whatever way I decide, will make a great deal of noise. In this situation I ask the favor of you as a friend, and as a lawyer still in the habit of law reading, which I have not been for 30. years, to tell me what you think on the following questions arising in the case of Duane, imprisoned for [*faded*] days for contempt of court in printing matters, not pretended to be untrue relating to a case depending in court, in which he was a party?

“1. Have not the *Whig* lawyers of England always denied that the publication of truth could be either a contempt or a libel.

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“2. If the *printing* of truth may be a contempt in England, can it be in the U. S. the constitution of which inhibits any law abridging the freedom of the press.

“3. If it maybe a contempt even in the U. S, may it not be pardoned by the President under that authority to pardon all offences against the U. S. except cases of impeachment? If either of these questions be answered in the affirmative, Duane may be relieved by pardon. If they [*faded*] whether we consider this as [*Rest illegible*].”

Jefferson also prepared the following message, but I cannot find that it was ever transmitted to the Senate:

“ Gent. of the Sen.—By a resolñ. of the Senate of the 14th of Mar. 1800. the President was requested to instruct the proper law officer to prosecute William Duane editor of the newspaper called the *Aurora* for certain publications in that newspaper of the 19th of Feb. 1800. Learning on my accession to the administration that the prosecution had been so instituted as to rest principally, if not solely, on the act called the Sedition Act, I caused it to be discontinued & another to be instituted under whatsoever other laws might be in existence against the offence alledged. If such other laws did exist the object would be obtained which was desired by the Senate, but if the State of the laws before the passage of that act had left the printer to make the publication complained of then the Sedition Act abridging that freedom was contrary to the very letter of the Constitution which declares that Congress shall make no law abridging the freedom of the press and consequently it was void. A new prosecution was accordingly instituted and brought forward with diligence, but the grand jury not finding the bill it remains without effect. In this procedure I have endeavored to do the duty of my station between the Senate and Citizen, to pursue for the former that legal vindication which was the object of their resolution; to cover the latter with whatsoever of protection the Constitution had guarded him & to secure to the press that degree of freedom in which it remained under the authority of the states, with whom

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alone the power is left of abridging that freedom, the general Government being expressly excluded from it.

“The correspondence on this subject with the attorney of the district will shew more fully the details of the proceedings in this case.”

On the subject of this message, Jefferson wrote to Gallatin:

“November 12, 1801.

“... The enclosed rough draft of a message I had prepared for the Senate will show you the views in conformity with which were all the instructions which went from hence relative to the Senatorial complaint against Duane. My idea of new prosecution was not that our Attorney should ever be heard to urge the common law of England as in force otherwise than so far as adopted in any particular State, but that, 1st, he should renew it in the Federal court if he supposed there was any Congressional statute which had provided for the case (other than the Sedition Act,) or if he thought he could show that the Senate had made or adopted such *lex parlamentaria* as might reach the case; or, 2d, that he should bring the prosecution in the State court of Pennsylvania, if any statute of that State, or statutory adoption of the common law of England, had made the offence punishable. These are my views. They were not particularly given by way of instruction to the Attorney, because it was presumed they would occur to him, and we did not choose, by prescribing his line of procedure exactly, to take on ourselves an unnecessary responsibility. I will thank you to return the paper, as well for this message as for the sketches, on the back of it, of some paragraphs of the first message to Congress, of which, in a day or two, I shall ask your revisal. In that the Sedition law will be presented under another view. Health and good wishes.”

Jefferson also wrote to Edward Livingston:

“ Washington, Nov. 1. 1801.

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“ Dear Sir,—I some days ago received a letter from Messrs. Denniston & Cheetham of the most friendly kind, asking the general grounds on which the *nolle prosequi* in Duane's case ought to be presented to the public, which they proposed to do. You are sensible I must avoid committing myself in that channel of justification, and that were I to do it in this case I might be called on by other printers in other cases where it might be inexpedient to say anything. Yet to so civil an application I cannot reconcile myself to the incivility of giving no answer. I have thought therefore of laying your friendship under contribution and asking you to take the trouble of seeing them, and of saying to them, that the question being in the line of the law I had desired you to give them the explanation necessary. My text of explanation would be this. The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into legal train. I found a prosecution going on against Duane for an offence against the Senate, founded on the sedition act. I affirm that act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of my functions. I therefore directed that prosecution to be discontinued and a new one to be commenced, founded on whatever other law might be in evidence against the offence. This was done and the Grand Jury finding no other law against it, declined doing anything under the bill. There appears to be no weak part in any of these positions or inferences. There is however in the application to you to trouble yourself with the question. For this I owe apology, and build it on your goodness & friendship.”

I accept with acknowledgment Mrs. Bathe's compliments, & beg leave to tender her my sincere respect, & to yourselves salutations & my best wishes.